IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.7.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

SECOND APPEAL No.449 OF 1994

Chinnannan ... Appellant/4th Defendant

Vs.

1.Paranimalai
2.Srinivasan
3.Rajammal
4.Perumayammal
5.Saroja
6.Raja
7.Minor Govindammal
8.Minor Gunasekaran ... Respondents (Plaintiff & Defendants 1,2,5 to 9)

Respondents 7 and 8 being minors are represented by their Court Guardian Sri M.Vanangamudi, Advocate, Mettur, Salem District.

* * *

Second Appeal preferred under Section 100 of the CPC, as against the judgment and decree dated 25.11.1993 rendered in A.S.No.40 of 1993 by the Subordinate Judge, Sankagiri thereby confirming the judgment and decree dated 8.3.1993 rendered in O.S.No.562 of 1983 by the District Munsif, Mettur.

* * *

For appellant : M/s.V.Krishnan

For respondents 2,4 and 6 : Notice Dispensed with

For other respondents : No appearance

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JUDGMENT

The 4th defendant is the appellant.

2. The first respondent herein, as plaintiff, has filed the suit for declaration, that he is the owner of the suit property, and for possession. The claim is based upon Ex.A.1 settlement deed dated 4.8.1969, executed by his father Srinivasan, who is the second respondent in the appeal. After the settlement deed, it seems, the father had alienated a portion of the suit property in favour of the appellant/4th defendant, for himself and as guardian of the plaintiff, under Ex.A.2 document dated 24.5.1972. The plaintiff, questioning this Ex.A.2 sale deed and another sale deed executed by defendants 2 and 3 in favour of the 5th defendant under Ex.A.3, dated 23.1.1976, has filed the suit for declaration and possession, as if those sale deeds will not bind him, since the properties belonged to him, as his separate properties, which cannot be sold by the guardian.

3. The defendants 4 and 5 contested the suit jointly alleging that the suit properties belong to the joint family and therefore, the settlement deed executed by the father is not valid; that the suit is barred by limitation and the suit as framed, is not maintainable, probably without a prayer to cancel the sale deeds, paying appropriate court fee, and that the document relied on by the plaintiff is not a settlement deed, whereas it is a Will.

4. The trial Court, framing necessary issues, proceeded with the trial of the case and at that time, on behalf of the plaintiff, he examined himself as P.W.1 and on behalf of the defendants 2 witnesses have been examined as D.Ws.1 and 2, including the fourth defendant. The plaintiff has produced three documents and the contesting defendants have produced five documents.

5. The learned District Munsif, while evaluating the above materials, came to the conclusion that the contesting defendants have failed to prove, that the suit properties belong to the Hindu joint family whereas it is established that the property was owned and possessed by Srinivasan as his self acquired property and Ex.A.1 is not a Will whereas it is only a Settlement Deed; that Srinivasan has no right to alienate the property and in fact, he has also not sold the property as guardian; that the suit, framed as such, is maintainable since there is no need to set aside the sales since the sales are void and that the suit is not barred by limitation. Thus taking the conclusion, the suit was decreed, as prayed for, as per the judgment dated 8.3.1993, which was under challenge at the instance of the fourth defendant alone, in A.S.No.40 of 1993. The 5th defendant, who suffered a decree in respect of certain portion of the property, has not preferred any appeal and therefore, as far as the decision rendered by

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the trial Court, regarding the property purchased by the 5th defendant, reached finality.

6. The first appellate Court, by going through the judgment rendered by the trial Court, as well as re-assessing the oral and documentary evidence, had come to the conclusion that the decision, rendered by the trial Court, on all issues, is in accordance with law and there is no reason to interfere with the finding. In this view, confirming the decree and judgment of the trial Court, the appeal came to be dismissed on 25.11.1993, which is under challenge in this Second Appeal.

7. This Court, while admitting the Second Appeal, has formulated the following Substantial Question of Law:

> "Whether the suit, as framed, is maintainable in the absence of a prayer for setting aside Ex.A.2?"

8. Heard Mr.V.Krishnan, learned counsel for the appellant. Despite sufficient opportunity given even by adjourning the case, no representation for the plaintiff/contesting respondent.

9. The learned counsel appearing for the appellant/4th defendant would submit that the sale deed executed by the plaintiff under Ex.A.2 is not void and if at all it is only voidable at the instance of the erstwhile minor, being a party to the document and if that should be challenged, there should be a prayer for cancellation of the said document, paying proper court fee. It is the further submission of the learned counsel for the appellant that admittedly, the plaintiff has not sought for cancelling the document, whereas the suit has been filed for declaration and possession, which is not maintainable. In order to appreciate the above defence, we have to re-capitulate certain facts.

10. Both the Courts below have concurrently found that the suit property was owned and possessed by the father of the plaintiff, as his self-acquired property, in which finding, I am unable to find any error and therefore, only on that basis, the appeal has to be disposed of. The submission of the learned counsel for the appellant, that Ex.A.1 is not a settlement deed whereas it is a Will, is also not acceptable to me, by going through the document, which was well considered by the Courts below and arrived at the conclusion that it is not a Will, whereas it is a settlement deed and in this finding also, I am unable to find any error, warranting my interference. In this view alone, while formulating the substantial question of law, this Court has not formulated the point regarding Ex.A.1. Therefore, the only point that remains for consideration is, whether the suit filed for mere declaration and possession, without a prayer for cancellation of Ex.A.2, is maintainable or not.

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11. In view of the concurrent finding, that the suit property was the self-acquired property of Srinivasan, he has every right to settle the property, which he did under Ex.A.1. Admittedly, at the time of the settlement deed, the plaintiff was a minor. While so, the father had alienated the property under the original of Ex.A.2 on 24.5.1972. While disposing the property, Srinivasan had sold the property not only for himself but also as the guardian of the minor, thereby showing that as a natural guardian, he had sold the property. This being the position, the finding of the trial Court, which was confirmed by the first appellate Court, at the end of paragraph 5 of its judgment, is certainly erroneous.

12. When the minor is shown as *eo nominee* party, when the minor's property is sold by the guardian, such alienation can be questioned by the minor, within three years from the date of his attaining majority, since the sale is only voidable. Because of the fact that the property was settled in favour of the minor and since the property was sold by guardian, it cannot be held that the sale deed itself is void and therefore, no prayer is necessary to set aside the sale deed. To support the above position, the learned counsel for the appellant drew my attention to a Full Bench decision of this Court in SANKARANARAYANA PILLAI AND ANOTHER vs. KANDASAMIA PILLAI [(1956) II M.L.J. 411], wherein while answering the points that if the minor is *eo nominee* party to a sale deed, is it necessary for him to sue for the cancellation of the document or is it suffice, if he files the suit for declaration, excluding the sale, as such, the Full Bench has arrived at an uniform conclusion and had held as follows:

> "Where a minor is *eo nomine* a party to a sale deed or other document of alienation by a guardian which he seeks to set aside, it is not enough for him to merely sue for possession and pay court-fee under section 7(v) of the Court-fees Act but he must sue for the cancellation of the document and pay court-fee under section 7(iv-A) of the Act. It makes no difference whether the sale deed is executed by the guardian of the minor as guardian or as manager of the joint family. In either case, the document has to be set aside. It is not open to the minor to ignore the transaction and seek possession of the property."

It is also answered

> "But where the minor is not *eo nomine* a party to the transaction and the transaction is on behalf of a joint family of which the minor was a member, he could always ignore the transaction as not binding on the family and can seek to recover possession."

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But, this kind of situation does not arise in this case. In view of the Ex.A.1 settlement deed, minor became the absolute owner and minor's property was sold by the natural guardian, without obtaining the Court permission. As natural guardian, he is competent to sell the property also. Therefore, as held in the above decision, when the said alienation is challenged, within three years after attaining the majority of the erstwhile minor, who is a *eo nomine* party in the transaction, it is incumbent upon him to set aside the sale, paying the necessary court fee. But, as seen from the plaint, no prayer is sought for to cancel the document-Ex.A.2 and no Court fee has been paid.

13. The above position of law is strengthened by a decision of the Supreme Court in DIVYA DIP SINGH AND OTHERS vs. RAM BACHAN MISHRA AND OTHERS (AIR 1997 SC 1465) wherein also it is held that 'sale effected by natural guardian after guardian *ad litem* was discharged is not void and if the minor want to challenge the sale within the limitation, he cannot ignore the sale deed executed by the guardian as void'. Applying the above principle also, it is to be held, the contention of the plaintiff, that Ex.A.2 is void and it need not be set aside or cancelled, cannot be accepted and if at all, it is only a voidable document and this being the voidable document, it should be cancelled within the limitation i.e. within three years from the date of minor attaining the majority.

14. In ANJALAI AND 6 OTHERS vs. ARUMUGA CHETTIAR AND ANOTHER (2000 (II) CTC 154) also, a question has arisen 'whether the release deed executed by the parents of erstwhile minor should be cancelled before staking any claim', wherein, a learned single Judge of this Court, relying on the above said Full Bench judgment of this Court, has come to the conclusion that the document does not became void but only voidable and this being the position, without setting aside the release deed, the suit filed for declaration alone cannot be maintained. Following the above settled position of law and considering the admitted facts, that the suit property has been alienated by the natural guardian, showing the minor as a *eo nominee* a party, the plaintiff ought to have filed the suit for cancelling the Ex.A.2 sale deed and the suit filed without such prayer, paying court fee, is not maintainable. For the foregoing reasons, the substantial question of law is answered in favour of the appellant and the result would be, the findings of the trial Court, as far as the appellant/4th defendant is concerned, have to be set aside.

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In the result, the appeal is allowed and the decree, in respect of the property purchased by the 4th defendant under Ex.A.2 is set aside, dismissing the claim of the plaintiff in the suit regarding the same. Consequently, CMP 5434/1994 is closed.

No order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

Rao

To

1.The Subordinate Judge, Sankagiri
2.The District Munsif, Mettur.

+1cc to Mr.R.Subramanian,Advocate Sr 33736
+1cc to Mr.L.Chandrakumar, Advocate Sr 33345

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